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IN THE
Supreme Court of the United States

OCTOBER TERM, 1945.

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No. 297.
—

THE ARUNDEL CORPORATION, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

—
On Petition for Writ of Certiorari to the Court of Claims.
—

PETITION FOR REHEARING.
—

WILLIAM S. HAMMERS,
Counsel for Petitioner.



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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the above named petitioner, The Arundel Corporation, by William S. Hammers, its counsel, and presents this, its petition for a rehearing of the above entitled proceeding and, in support thereof, respectfully submits, as a basis for the action requested, the following:

This case involves the meaning and application of the terms of a widely used standard form of Government con-

struction contract as applied to an underwater dredging project, and presents questions of substantial importance that have not been, but should be, settled by this Court.

The particular provision involved herein is Article 4, which prescribes a procedure for adjusting the contract price should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications. (R. 9)

The Court has in at least two instances, namely, *United States v. Callahan Walker Construction Co.*, 317 U. S. 56, and *United States v. Rice*, 317 U. S. 61, granted certiorari to review decisions of the Court of Claims involving the meaning and application of various articles of this standard form of contract. In each of those instances the United States was the petitioner, but it is believed that the Court should be animated by a justice as anxious to consider the rights of the contractor as those of the Government.

In *United States v. Rice*, supra, involving articles 3 and 4 of this standard form of government contract, the scope of the provisions was stated as follows:

Article 3, entitled "Changes," governs the procedure under which the government may alter the specifications of the contract for general causes. Article 4, entitled "Changed Conditions," governs the procedure under which the government may alter the contract to meet unanticipated physical conditions.

* * * *

Both clauses deal with changes made necessary by new plans or new discoveries made subsequent to the signing of the contract.

The issue in this suit emanates from the discovery, made subsequent to the signing of the contract, of a substantial

change in the physical conditions from those shown on the drawings and represented in the specifications; and the basis of the action is the failure and refusal of respondent to modify the terms of the contract to provide for the increase of cost resulting from such changed conditions, pursuant to the covenant in Article 4 of the contract.

The contract between petitioner and respondent was for dredging to a depth of 32 feet below mean low water an area 100 feet wide and 26,500 feet long in the Cape Cod Canal, Mass. (R. 19, 43)

The area to be dredged had been surveyed by respondent's engineers about June 1938 (R. 47) and drawings prepared therefrom showing the work to be done, which drawings were listed in, and made a part of, the specifications, and later of the contract. (R. 7, 19) On the basis of the surveys the quantity of material to be dredged was determined and set out in the specifications and the invitation for bids. (R. 20, 47-48) The form of bid set out that the "quantity for canvassing bids" for the area involved was 2,894,500 cubic yards, scow measurement. (R. 42) The quantity of material was the essence of the contract. It was beyond question the principal physical condition involved.

During the progress of the work under the contract, sub-surface conditions materially differing from those shown on the drawings or indicated in the specifications were encountered, investigated, and found to exist. (R. 49) From new surveys made in October and November 1938, after the contract had been signed, it was determined that the quantity of material to be dredged was 2,468,550 cubic yards instead of 2,894,500 cubic yards as had been represented, a reduction of 425,950 cubic yards. (R. 49)

The situation is, therefore, the same as that involved in the case of *Hollerbach v. United States*, 233 U. S. 165, the only difference being that in that instance the representation made related to the quality or character of material to be encountered and in this instance related to the

quantity. In the *Hollerbach case*, the Court said, at page 172:

We think this positive statement of the specifications must be taken as true and binding upon the government and that upon it, rather than upon the claimants, must fall the loss resulting from such mistaken representations. We think it would be going too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the government as a basis of the contract left in no doubt. If the government wished to leave the matter open to the independent investigation of the claimants, it might easily have omitted the specification as to the character of the filling back of the dam. In its positive assertion of the nature of this much of the work it made a representation upon which the claimants had a right to rely without an investigation to prove its falsity.

While it is an established fact that the subsurface conditions encountered by petitioner in the performance of its contract differed materially from those shown on the drawings or indicated in the specifications, respondent seeks to escape liability for the increase of cost resulting from such conditions on the ground that they were brought about by an act of God occurring after the contract was entered into, and in that respect has been upheld by the Court of Claims. (R. 49, 61) In the opinion, the Court of Claims says that "It is a general principle of law that neither party to a contract is responsible to the other for damages through a loss occasioned as a result of an act of God, unless such an obligation is expressly assumed," and construed Article 4 as applying only to "conditions which actually existed but were unknown by either party at the time the specifications and drawings were prepared and at the time the bid was submitted and accepted."

An examination of the covenant in article 4 of the contract will show, however, that it contains no reservations or exceptions. It merely provides that if, during the

progress of the work, the conditions described therein are encountered by the contractor, or discovered by the Government, the contract will be modified to provide for any increase of cost resulting from such conditions.

In *Standard Life Co. v. McHutty*, 157 Fed. 224, it was said by the court, and the language used seems particularly appropriate here, that "The natural, obvious meaning of the provisions of a contract should be preferred to any curious hidden sense, which nothing but the exigencies of a hard case and the ingenuity of a trained and acute intellect could discover."

The courts have held that where a contract is prepared in one of the Government departments, leaving the contractor no choice as to form or phraseology, it must, where the wording gives rise to doubt, be construed against the Government and favorably to the contractor. *Noonan v. Bradley*, 9 Wall. 394; *Mouler v. American Life Ins. Co.*, 111 U. S. 335; *Chambers v. United States*, 24 C. Cls. 387; *Otis v. United States*, 20 C. Cls., affirmed in 120 U. S. 115; *Moore v. United States*, 196 U. S. 157.

This standard form of Government construction contract was prepared by respondent, with no choice given to petitioner as to form or phraseology. Article 4 thereof is a provision in the interest of both the Government and the contractor. It is important, therefore, to the Government as well as to the petitioner and others interested in government contract work that the questions of law involved, and set out in the petition for the writ, be authoritatively decided by this Honorable Court.

The general principle of law is that where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation because unforeseen difficulties are encountered unless such contingencies have been guarded against by a provision in the agreement. The natural, obvious, and generally understood, meaning and purpose of Article 4 is that it provides such protection.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the writ requested be issued.

Respectfully submitted,

WILLIAM S. HAMMERS,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I, William S. Hammers, counsel for the above-named petitioner, The Arundel Corporation, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WILLIAM S. HAMMERS,
Counsel for Petitioner.

